

No. 12612

United States
Court of Appeals
for the Ninth Circuit.

ERWIN P. WERNER,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

OCT - 4 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ERWIN P. WERNER,
611 Carlton Way,
Los Angeles 28, Calif.

For Appellee:

ERNEST A. TOLIN,
United States Attorney,

IRL D. BRETT,
Special Assistant to the Attorney General,
600 U. S. Post Office & Court House
Bldg., Los Angeles 12, Calif.

United States District Court, Southern District
of California, Central Division

No. 10539-C

ERWIN P. WERNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ACTION FOR REFORMATION OF LEASE
AND REASONABLE RENTAL FOR USE
AND OCCUPATION OF LAND

Comes Now Plaintiff and, for several causes of
action, alleges as follows:

First Cause of Action

I.

That, at all times herein mentioned, Plaintiff has
been, and now is, a resident of the County of Los
Angeles, State of California, and at all times has
been, and now is, a citizen of the United States.

II.

That the United States District Court has juris-
diction over this litigation by reason of the fact
that the Defendant is the United States of America
and the Plaintiff is a citizen of said country.

III.

That at all times herein mentioned the Plaintiff
has been, and now is, the legal owner in fee, and
entitled to possession and enjoyment of that certain

parcel of land situated in Riverside County and consisting of forty acres, which is more particularly described as follows:

The southeast (SE) one-quarter ($\frac{1}{4}$) of the southeast (SE) one-quarter ($\frac{1}{4}$) of Section Sixteen (16), Township Three (3) South, Range four (4) West, S.B.B. & M. continuing forty (40) acres more or less.

IV.

That prior to the 1st day of February, 1943, the above-described property was placed and held in trust by Mark L. Herron and Barbara Herron, his wife, as trustees, with directions and upon the understanding that said property would be returned to the Plaintiff herein, upon Plaintiff's request.

V.

That on or about the 1st day of February, 1943, and while said land was so held in trust by the said Mark L. Herron and his wife, Barbara, as trustees, as aforesaid, a lease of said land was made and entered into by and between said trustees, as lessor, with the United States of America, as lessee, copy of said lease being attached hereto and made a part hereof and being marked "Exhibit A." That said lease was prepared by the United States of America, Defendant. That the United States of America, under the terms and conditions of said lease, agreed to pay to the lessor, or his assigns, a rental in the sum of \$25.00 per year, payable from execution of the lease and to continue thereafter until the termination of the "unlimited national emergency,"

as declared by the President of the United States on May 27, 1941, by Proclamation 2487. That, by and through a mutual mistake of Plaintiff and Defendant, as hereinafter set forth, said lease did not and does not now truly state or express the intention of the said parties.

VI.

That at the time of issuance of the said Presidential Proclamation, heretofore referred to, the defendant Government was then in a state of war with enemies then unknown, but at the date of the execution of the said lease the Defendant was engaged in actual warfare with the foreign nations of Italy, Germany and Austria, and the Imperial Government of Japan, which constituted the "Axis belligerents" referred to in said proclamation. That, on the 1st day of February, 1943, it was therefore the mutual understanding of the parties to this agreement that by the use of the words in said lease, namely, "that said lease shall in no event extend beyond six months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487)," was meant in their ordinary and popular sense to mean and was, on the date of the execution of said lease, understood to be, "six months from the date of the cessation of actual hostilities with the said Axis nations then at war, or the surrender of said Axis nations," which surrender finally occurred on the 14th day of August, 1945; that in truth and in fact, on the 31st day of December, 1946, it was declared

by proclamation of the President of the United States, Proclamation 2714, that "there was the cessation of hostilities of World War II."

VII.

That until the reconveyance to Plaintiff of said real property, as aforesaid, the terms and conditions of said lease agreement and mutual mistake were unknown to the Plaintiff herein, until June 14, 1948, when a copy of said lease was delivered to Plaintiff by said trustees. That immediately since that time and upon the said discovery of the said mutual mistake, the Plaintiff has demanded that Defendant reform said lease and correct the said mutual mistake, but Defendant has at all times herein mentioned refused to do so.

VIII.

Plaintiff alleges that said real property has a fair market value of approximately \$20,000.00; and that it is grossly unjust, unfair and inequitable for the said Defendant to assert any right, title or interest in and to said contract lease, under its present terms and conditions, as it must be presumed that the parties hereto intended to make an equitable and conscientious agreement and lease of said real property.

Second Cause of Action

I.

Plaintiff incorporates paragraphs I, II, III, IV, V, VI, VII and VIII of the first cause of action and makes them a part of this, his second cause of

action, the same as though separately set forth herein.

II.

That said lease was terminated on the 14th day of August, 1945, by reason of the said cessation of hostilities on the part of the said Axis nations; that ever since said date of August 14, 1945, the Defendant has been in actual possession and enjoyment of the said real property. Plaintiff further alleges that the fair market value of said land is \$20,000.00.

III.

That the use of said real property for said period was reasonably worth \$2,500.00 per year; that the Defendant has not paid said sum or any part thereof.

Wherefore, Plaintiff prays judgment against the Defendant as follows:

1. That by decree of this court the hereinabove mentioned lease dated 1st day of February, 1943, be reformed to conform with the actual intention of the parties.

2. For the reasonable value of the use and occupation of said real property occupied by Defendant since the 14th day of August, 1945.

3. For such other and further relief as to the court may seem proper.

/s/ MILAN MEDIGOVICH,
Attorney for Plaintiff.

/s/ ERWIN P. WERNER,
In Propria Persona.

EXHIBIT A

U. S. Standard form No. 2 (revised)

Copy

Lessor

Lease

Between Mark L. Herron and Barbarra W. Herron and the United States of America.

1. This Lease, made and entered into this first day of February in the year one thousand nine hundred and forty three by and between Mark I. Herron and Barbarra Herron, husband and wife whose address is 1025 Chapman bldg, Los Angeles, California. for themselves, their heirs, executors, administrators, successors, and, assigns, hereinafter called the lessor, and the United States of America, hereinafter called the government:

Witnesseth: The parties hereto for the consideration hereinafter mentioned covenant and agree as follows:

2. The lessor hereby leases to the Government the following described premises, viz:

All of that parcel of land in the Alessandro District, County of Riverside, State of California, described as:

The Southeast quarter (SE $\frac{1}{4}$) of the South east quarter (SE $\frac{1}{4}$) of Section 16, Township 3 South, Ranges 4 West, S.B.B. & M., containing forty acres, more or less.

(rubber stamp) The supplies and services to be obtained by this instrument are authorized by, are the purpose set forth in, and (unreadable) procurement authority.

8-30068 p 330-05 A 0905- 24

.....
the available balance of which is sufficient to cover the cost of same

to be used exclusively for the following puposes
(see instrucion 3: Military purposes.

3. To Have and to Hold the said premises with their appurtanances for the term beginning February 1, 1943 and ending with June 30, 1943

MLH

BWH

negotiated lease

4. The government shall not assign this lease in any event, and shall not sublet the premises except to a desirable tenant, and for a similar purpose, and will not permit the use of said premises by anyone other than the government, such sublessee, and the agents and servants of the Government, or of such sublessee.

5. This lease may, at the option of the government, be renewed from year to year at a rental of

Twenty-five and no/100 (\$25.00) per year and otherwise on the terms and conditions herein specified, provided notice be given in writing to the lessor at least thirty days (30 before this lease

or any renewal thereof would otherwise expire; provided that no renewal thereof will extend the period of occupancy of the premises beyond six (6) months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27th, 1941, (Proclamation 2487).

6. The lessor shall furnish to the Government, during the occupancy of said premises, under the terms of this lease, as part of the rental consideration, the following:

Nothing.

7. The Government shall pay the lessor for the premises rent at the following rate:

Twenty-five and no?100 Dollars (\$25.00) per year, or prorata amount for ffactional period of use thereof.

Finance officer, U.S. Army, Port Douglas, Utah, is deignated to pay this rental.

Payment shall be made at the end of each fiscal year.

8. The Government shall have the right, during the existance of this lease, to make alterations, attach fixtures, and erect additions, such alterations, additions, structures, or signs shall not be detrimental, to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which additions, fixtures, or structures so placed in or upoun

or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the lessor, shall, before the expiration of this lease or renewal thereof, reestor the premises to the same condition as that existing at the time of entering upoun the same under this lease, reasonable and ordinary ware and tear and damages by the elements or by circumstances over which the Government has no control, excepted: Provided, however, that if the lessor requires such restoration, the lessor shall give written notice thereof to the Government twenty days (20) before the termination of this lease.

9. (cancelled)

10. (cancelled)

11. No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the lease be for the general benefit of such corporation or company.

12. The Government reserves the right to cancel this lease at any time during its life or renewal thereof by giving thirty days (30) advance written notice to the lessor.

13. The condition of the demised premises is outlined in a joint Record of Physical Survey which is appended hereto and made a part hereof.

Paragraphs 9 and 10 deleted, and Paragraphs 12 and 13 added prior to execution hereof,

MLH

BWH

In Witness Whereof, the parties hereto have hereunto set and subscribed their names as of the date first above written.

MARK L. HERRON

MARK L. HERRON, and

BARBARA W. HERRON

BARBARA W. HERRON,

husband and wife

Lessor

UNITED STATE OF AMERICA

By THOMAS F. CROGAN

Chief, Los angeles Sub-office

Official title

Contracting officer.

INEZ M. KEMPER

INEZ M. KEMPER

2020 Beachwood Dr.

(Address)

Hollywood, Calif.

(If the lessor is a corporation, the following certificate shall be executed by the secretary as assistant secretary.)

L,, certify that I am the
Secretary of the corporation named as Lessor in
the attached lease: that, who signed
said lease on behalf of the Lessor, was then

..... of said corporation: that said lease was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

.....

[Corporate Seal.]

Instructions to Be Observed in Executing Lease

1. This standard form of lease shall be used whenever the Government is the lessee of real property; except that whenever the total consideration does not exceed \$100 and the term of the lease does not exceed one year the use of this form is optional. In all cases where the rental to be paid exceeds \$2,000. per annum the annual rental shall not exceed 15 per centum of the fair market value of the rented premise at the date of the lease. Alterations, improvements, and repairs of the rented premises by the Government shall not exceed 25 per centum of the amount of the rent for the first year of the rental term or for the rental term if less than one year.

2. The lease shall be dated and the full name and address of the lessor clearly written in paragraph 1.

3. The premises shall be fully described, and, in case of rooms, the floor and room number of each room given. The language inserted at the end of article two of the lease should specify only the general nature of the use, that is, "office quarters," "storage space," etc.

4. Whenever the lease is executed by an attorney, agent, or trustee on behalf of the lessor, two authenticated copies of his power of Attorney, or other evidence to act on behalf of the lessor, shall accompany the lease.

5. When the lessor is a partnership, the names of the partners composing the firm shall be stated in the body of the lease. The lease shall be signed with the partnership name, followed by the name of the partner signing the same.

6. Where the lessor is a corporation, the lease shall be signed with the corporate name, followed by the signature and title of the officer or other person signing the lease on its behalf, duly attested and, if requested by the Government, evidence of his authority so to act shall be furnished.

7. Under paragraph 6 of the lease insert necessary facilities to be furnished, such as heat, light, janitor service, etc.

8. There shall be no deviation from this form without prior authorization by the Director of Procurement, except-

(a) Paragraph 3 may be drafted to cover a monthly tenancy or other period less than a year.

(b) In paragraph 5, if a renewal for a specified period other than a year, or for a period optional with the Government is desired, the phrase "from year to year" shall be deleted and proper substitution made. If the right of renewal is not desired or cannot be secured paragraph 5 may be deleted.

(c) Paragraph 6 may be deleted if the owner is not to furnish additional facilities.

(d) If the premises are suitable without alterations, etc., par. 8 may be deleted.

(e) Par. 9 provides that the lessor shall, "unless herein specified to the contrary, maintain the premises in good order, etc. A modification or elimination of this requirement would not therefore be a deviation.

(f) In case the premises consist of unimproved land, par 10 may be deleted.

(g) When executing leases covering premises in foreign countries, departure from the standard form is permissible to the extent necessary to conform to local laws, customs or practices.

(h) Additional provisions, relating to the particular subject matter mutually agreed upon, may be inserted, if not in conflict with the standard provisions, including a mutual right to terminate the lease upon a stated number of days' notice, but to permit only the lessor so to terminate would be a deviation requiring approval as above provided.

9. When deletions or other alternations are permitted specific notation thereof shall be entered in the blank space following par 11 before signing.

10. If the property leased is located in a state requiring the recording of leases in order to protect the tenants rights, care should be taken to comply with all such statutory requirements.

CR Form 208

No. W2972 Eng 1450

Copy

Supplemental Agreement to Dispense with
Notice of Renewal.

This Supplemental Agreement entered into this 31st day of May, 1943, by and between Mark L. Herron and Barbara Herron, husband and wife, whose address is 1025 Chapman Building, Los Angeles California for themselves, their heirs executors, administrators, successors, and assigns, hereinafter called the lessors, and the United State Government, hereinafter called the Government, Witnesseth:

Whereas on February 1, 1943, a lease was entered into between the lessor and the Government covering all of that Southeast (SE) $\frac{1}{4}$ of the south-east quarter (SE $\frac{1}{4}$) of section 16, Township 3 South, Range 4 West, S.B.B. & M., containing forty acres, more or less. Being located in the Alesandro District of the County of Riverside, State of California. for a period February 1, 1943, to June 30, 1943, with option of renewal annually thereafter to six months from the date of the termination of the unlimited National Emergency, as declared by the president of the United States on May 27, 1941, (Proclamation 2487).

Whereas it is desired to amend said lease to dispense with the service of notice of renewal for each fiscal year, as hereinafter provided;

Now, Therefore, the parties hereto do hereby amend said lease in the following respects only:

1. Provisions 3 and 5 are deleted, and there is inserted in lieu thereof the following provision numbered 3:

“3. To Have and to Hold the said premises with their appurtenances for the term beginning July 1, 1943 through June 30, 1944, provided that, unless and until the Government shall give notice of termination in accordance with provision 12 hereof, this lease shall remain in force thereafter from year to year without further notice; provided further that adequate appropriations are available from year to year for the payment of rentals; and provided further that this lease shall in no event extend beyond six months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27, 1941, (Proclamation.”

In Witness Whereof, the parties hereto have executed this instrument as of the day and year first above written.

MARK L. HERRON

MARK L. HERRON

BARBARA W. HERRON

BARBARA W. HERRON

Lessor.

THE UNITED STATES OF
AMERICA

By THOMAS F. CROGHAN

(Contracting officer)

Thomas F. Croghan, Chief,
Los Angeles Sub-office.

Witness:

INEZ M. KEMPER

INEZ M. KEMPER

2020 Beachwood Dr.
Hollywood Cal.

State of California,
County of Los Angeles—ss.

Erwin P. Werner, being by me first duly sworn, deposes and says: that he is the Plaintiff in the above entitled action; that he has read the foregoing Action for Reformation of Lease and Reasonable Rental for Use and Occupation of Land and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ ERWIN P. WERNER

Subscribed and sworn to before me this 8th day of November, 1949.

[Seal] /s/ W. E. SCHREYER,

Notary Public in and for Said County and State of California.

[Endorsed]: Filed November 8, 1949.

[Title of District Court and Cause.]

NOTICE OF SPECIAL APPEARANCE OF,
AND MOTION TO DISMISS BY, THE
UNITED STATES OF AMERICA AND
POINTS AND AUTHORITIES

To: Plaintiff, Erwin P. Werner, and to Milan
Medigovich, Esq., his attorney:

You and Each of You Will Please Take Notice that on Monday, April 3, 1950, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable James M. Carter, Judge thereof, Room No. 3, Second Floor, Courthouse and Postoffice Building, Los Angeles, California, defendant, United States of America, will appear specially and solely for the purpose of such motion, and not otherwise, and move this Honorable Court to dismiss the Complaint herein.

Said motion will be made upon the following grounds:

1. That the United States has not consented to, or submitted to, the jurisdiction of this Court in equity proceedings and the exercise of jurisdiction to reform a written lease is the exercise of equitable jurisdiction and such remedy is an equitable remedy.

2. That the Complaint fails to state claim upon which relief can be granted as against the United States of America, in the following particulars:

- a) The Complaint seeks to obtain through this Court, the equitable remedy of reformation of a

written contract entered into between the United States of America and predecessors in interest of plaintiff; that it does not disclose, expressly or by implication, any restriction upon the right of such predecessors in interest to enter into such lease as written;

b) That although the Complaint alleges that the lessors to the United States were Mark L. Herron and Barbara Herron, his wife, and that they held title to the premises as trustees, it does not allege:

(1) For whom they were trustees;

(2) That there was any restriction upon their right to lease the premises;

(3) That the United States had any knowledge of the trust or of its terms or conditions;

(4) How said trustees could have held title to the property and, at the same time, plaintiff could have been the legal owner in fee and entitled to the possession and enjoyment thereof;

c) That the Complaint does not allege when or how or by whom the property which is the subject matter of the lease, was reconveyed to plaintiff;

d) That the Complaint does not allege how or in what manner the lease could have been executed by and through a mutual mistake of the plaintiff (who is not a party to the lease) and the defendant;

e) The Complaint, together with the exhibits annexed thereto, discloses that the language used in the lease, and in the supplemental modification thereof, is explicit and unambiguous and refers to and in-

cludes the terms and provisions of a presidential proclamation which is, in turn, explicit and unambiguous; that the lease was made on behalf of the United States by Army officials, whose contracts could only be made in writing and who could only bind the United States by a written contract;

f) The contract of lease being for a fixed fee, such is the measure of the compensation for which the United States is liable and it is not liable in quantum meruit;

g) There is no allegation in the Complaint that the rental fixed by the lease has not been paid to, and received by, the lessors therein named;

h) There is no allegation in the Complaint as to why, assuming that the lessors were trustees and agents of the plaintiff, the knowledge of such agents should not be imputed to the plaintiff and, in view of such imputation of knowledge, plaintiff is guilty of laches.

Said motion will be based upon the records and files in this proceeding and the statutory and case law applying thereto.

Dated: March 21, 1950.

ERNEST A. TOLIN,
United States Attorney.

IRL D. BRETT,
Special Assistant to the
Attorney General.

By /s/ JOSEPH F. MacPHERSON,
Attorneys for Defendant.

Points and Authorities
General

Rule 12 (b) (1) (2) and (6)

1.

Reformation of instruments is peculiarly an equitable remedy.

Black v. Richfield Oil Corp. (CCA 9) 146
Fed. (2) 801.

2.

Except as Congress has consented, there is no jurisdiction in any Court to entertain claims against the United States.

U. S. v. Sherwood, 312 U.S. 584, 587-588, 85
L. ed. 1058, 1062.

3.

Such statutes which relinquish sovereign immunity must be strictly construed.

United States v. Sherwood, 312 U.S. 584, 590,
85 L. ed. 1058, 1063.

4.

The United States has not consented to suits in equity against it.

Harvey v. United States, 105 U.S. 671, 26
L. ed. 1206, 1209.

Rambo v. United States (CCA 5), 145 Fed.
(2) 670.

5.

While the Tucker Act (28 U.S.C., Sec. 41, subsec. 20) was construed to include the equitable jurisdiction to reform contracts of the United States for payment of money (Cf. *U.S. v. Milliken*, 202 U.S. 168, 173-174; 50 L. ed. 980, 982-983; *Cramp v. U.S.*, 239 U.S. 221, 230; 60 L. ed. 238, 242) that statute has been amended to delete the reference to equity: 28 U.S.C. (Rev.) Sec. 1346.

7.

A trustee hold the legal title.

Lincoln v. French, 105 U.S. 614; 26 L. ed. 1189.

25 Cal. Jur. "Trusts," § 165, p. 314.

Brichette v. Raney, 76 Cal. App. 232, 248, 245 Pac. 235.

8.

A trustee is an agent. Civil Code, Sec. 2267.

9.

Knowledge of agent within the apparent scope of the agency is imputed to principal.

Civil Code, Sec. 2300.

Civil Code, Sec. 2332.

10.

Public officers have no ostensible authority as agents of the United States.

Whiteside v. United States, 93 U.S. 247, 23 L. ed. 882.

11.

Contracts for the United States by Army officers must be in writing.

Harper v. United States (CCA 5), 10 Fed. (2) 150, 151.

Rev. Stat. §§ 3744, 3746.

Comp. Stat. § 6895, § 6898.

12.

The lease, the supplemental lease and Presidential Proclamations.

No. Pac. Ry. v. United States, 70 Fed. Supp. 836, 850.

Proclamation #2487, Code Fed. Reg.

Cumulative Supp., Title 3, p. 234.

Proclamation #2714, C.F.R. 1946, Title 3, p. 77.

Affidavit of Service by Mail—1013a, C.C.P.

State of California,
County of Los Angeles—ss.

Julia Westover, being first duly sworn deposes and says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of 18 years and is not a party to the within and above-entitled action; that affiant's business address is 807 Federal Building, Los Angeles 12, California.

That on the 21st day of March, 1950, affiant served the within Notice of Special Appearance of, and

Motion to Dismiss by, the United States of America and Points and Authorities on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorney for plaintiff at the business address of said attorney as follows: Mr. Milan Medigovich, Attorney at Law, 1215 Transamerica Building, 649 South Olive Street, Los Angeles 14, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ JULIA WESTOVER.

Subscribed and sworn to before me this 21st day of March, 1950.

[Seal] /s/ ALBERT N. MINTON,
Notary Public in and for
Said County and State.

[Endorsed]: Filed March 21, 1950.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This case is before the court on motion of the United States to dismiss plaintiff's "action for reformation of lease and reasonable rental for use

and occupation of land" in Riverside County, California.

The material facts as alleged in the complaint are these. Prior to February 1, 1943, the land involved "was placed and held in trust by Mark L. Herron and * * * wife, as trustees, with directions and upon the understanding that said property would be returned" to plaintiff upon demand.

On February 1, 1943, the trustees, as lessor, and the United States, as lessee, entered into a lease of the land for one year at a rental of \$25, with option granted to the lessee to renew from year to year "provided that no renewal thereof will extend the period of occupancy * * * beyond six (6) months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27th, 1941 (Proclamation 2487)." [See 3 Code Fed. Regs. 234 (Cum. Supp. 1943).]

Plaintiff further alleges that the words of the provision just quoted were intended "in their ordinary and popular sense to mean" and were, "on the date of the execution of said lease, understood to be 'six months from the date of cessation of actual hostilities with * * * or the surrender of said Axis nations,' which surrender finally occurred on the 14th day of August, 1945; * * * [and] on the 3rd day of December, 1946, it was declared by proclamation of the President of the United States, Proclamation 2714, that 'there was the cessation of hostilities of World War II.' " [See 3 Code Fed. Regs. 77 (Supp. 1946).]

For a second cause of action plaintiff alleges that "said lease was terminated on the 14th day of August, 1945"; that the lessee has since had the use of the property, which "for said period was reasonably worth \$2500.00 per year." The prayer is for reformation of the lease "to conform with the actual intention of the parties," for recovery of "the reasonable value of the use and occupation of said real property * * * since the 14th day of August, 1945," and for general relief.

Defendant's motion to dismiss asserts two defenses [Fed. R. Civ. P. 12 (b), (g), (h); see *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F. 2d 871 (3rd Cir. 1944)]: (1) lack of jurisdiction over the person of the defendant [Fed. R. Civ. P. 12 (b) (2)], the ground asserted being "that the United States has not consented to, or submitted to, the jurisdiction of this court in equity proceedings"; and (2) failure to state a claim upon which relief can be granted [Fed. R. Civ. P. 12 (b) (6)].

It is settled of course that "suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." [*Munro v. United States*, 303 U.S. 36, 41 (1938); see, also, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944); *Reid v. United States*, 211 U.S. 529, 538 (1909).] By the Tucker Act [24 Stat. 507 (1887), as amended, 28 U.S.C. § 41 (20) (1946)], the United States of America, as sovereign, consented to be sued in this court on "all claims not exceeding \$10,000 founded * * * upon any contract, express or implied, with the Government of the United States * * * in respect

to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. * * *

The consent thus granted by the Congress was construed to include suits in equity for reformation of contracts of the United States for payment of money. [See *United States v. Milliken Imprinting Co.*, 202 U.S. 168, 173-174 (1906); *Ackerlind v. United States*, 240 U.S. 531, 534 (1916); *Cramp v. United States*, 239 U.S. 221, 230 (1915).] However, the Government points to the fact that the statute "has been amended to delete the reference to equity." [See 28 U.S.C. § 1346(a) (2) (1948).] Omission by the revisers of Title 28 of the former reference to "equity," it is argued, constitutes in effect a withdrawal by the Government of consent to be sued in this court for equitable relief.

But the reviser's notes to § 1346 of new Title 28 seem to anticipate that argument with the explanation that: "The words 'in a civil action or in admiralty,' in subsection (a) (2), were substituted for 'either in a court of law, equity, or admiralty' to conform to Rule 2 of the Rules of Civil Procedure for the United States District Courts." [28 U.S.C.A. notes following § 1346 (1950).] Similar explanation for like amendments is to be found in the reviser's notes to §§ 1331, 1332, 1335, 1338, 1341, 1342, 1343, 1345, 1347, 1399, 1400, 1441, 2072 and 2073. [See 28 U.S.C.A. notes following the sections cited (1950).] Rule 2 of the Federal Rules of Civil Procedure declares: "There shall be one

form of action to be known as 'civil action.' '' The notes to Rule 2 explain: "Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action presented in these rules." [28 U.S.C.A. § 723c notes following Rule 2 (1941); and see *United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. Gallagher*, 151 F. 2d 556 (9th Cir. 1945); 48 Stat. 1064 (1934), 28 U.S.C. § 723c (1946).]

As amended upon revision "to conform to Rule 2," 28 U.S.C. § 1346 (a) (2) now reads: "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of * * * any * * * civil action * * * against the United States, not exceeding \$10,000 in amount, founded * * * upon any express or implied contract with the United States. * * *". And the Supreme Court has recently held that the phrase "any civil action" used in the revision of Title 28 "means what it says." [*Kilpatrick v. Texas & Pac. Ry.*, 337 U.S. 75, 77 (1949).]

Accordingly it must be concluded that omission of the word "equity" from § 1346 (a) (2) in the revision of Title 28 of the United States Code does not indicate congressional intent to withdraw consent of the sovereign to submit to the equitable jurisdiction of this court in actions involving contracts of the United States. The Government's motion to dismiss upon that ground must therefore be denied. [cf. *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *United States v. Sherwood*, *supra*,

312 U.S. at 590; *United States v. Shaw*, 309 U.S. 495, 501 (1940).]

There is, however, another ground which requires dismissal of plaintiff's action. The time limitations for commencement of actions against the United States under the Trucker Act [See 28 U.S.C. § 41 (20) 1946)] are found in 28 U.S.C. § 2401 (a), which stipulates that: "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Validity of the lease and option to renew in controversy here and the rights of the parties derived therefrom are governed by the law of California where the land is situated and the lease was made. [*United States v. Petty Motor Co.*, 327 U.S. 372, 380, 381 (1946); *United States ex rel TVA v. Powelson*, 319 U.S. 266, 279 (1943); *United States v. Bechtold Co.*, 129 F. 2d 473, 477 (6th Cir. 1942); see, also, *United States v. Westinghouse*, U.S. (April 17, 1950); *United States v. Burnison*, 339 U.S. 87 (1950); *Becker v. Submarine Oil Co.*, 55 Cal. App. 698, 204 Pac. 245 (1922); *Restatement, Property* § 395, comment b (1944).] As said in *Reading Co. v. United States*, 268 U.S. 186, 188 (1925):

"The contract is to be construed and the rights of the parties to be determined by the application of the same principles as if the contract were between individuals."

In the case at bar the trustees who made the lease were plaintiff's agents [Cal. Civ. Code § § 2267,

2300], and their knowledge of the alleged mutual mistake upon which plaintiff's right of action is founded must be imputed to him. [Cal. Civ. Code § 2332.] Plaintiff's right of action must then be held to have first accrued on February 1, 1943, when the lease was made. [See *Goodfellow v. Barritt*, 130 Cal. App. 548, 20 P.2d 740, 743 (1933); cf. *Phelps v. Grady*, 168 Cal. 73, 141 Pac. 926 (1914).] This action was not commenced until November 8, 1949 — more than six years thereafter. Plaintiff's claim is therefore barred by the provisions of 28 U.S.C. § 2401 (a).

This court will dismiss an action against the United States for want of jurisdiction whenever the record discloses the claim is barred, even though the bar of the statute has not been pleaded on behalf of the Government. [See *Munro v. United States*, supra, 303 U.S. at 41; *Finn vs. United States*, 123 U.S. 227, 232-233 (1887); *Edwards v. United States*, 163 F. 2d 268, 269 (9th Cir. 1947); *Gans S.S. Line v. United States*, 105 F. 2d 955, 957 (2d Cir. 1939).]

Plaintiff's action must then be dismissed for want of jurisdiction over the person of the defendant; and it is so ordered.

Counsel for defendant will submit judgment of dismissal accordingly [See Fed. R. Civ. P. 41(b)] pursuant to local rule 7 within five days.

May 26, 1950.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed May 26, 1950.

[Title of District Court and Cause.]

ORDER FOR DISMISSAL

Upon the ground of the legality of jurisdiction over the person of the defendant, the defendant, United States of America, having heretofore appeared specially in this proceeding and solely for the purpose of the Motion made by it, and having regularly moved this Court for an Order dismissing the Complaint herein, said Motion having come on regularly for hearing on Monday, April 3, 1950, at the hour of 10 a. m., in Courtroom No. 2, before the Hon. William C. Mathes, United States District Judge, and the Motion having been submitted upon briefs for consideration and decision, the Court now finds that plaintiff's right of action first accrued on February 1, 1943; that this action was commenced on November 8, 1949, which was more than six years following the date of accrual of such right of action, and that plaintiff's claim is, therefore, barred by the provisions of Title 28, Section 2401(a) U.S.C., and, for such reason, this Court does not have jurisdiction over the person of the defendant, United States of America.

The Court now orders that said Motion for Dismissal be, and it is hereby, granted, and that the cause is hereupon dismissed for want of jurisdiction over the United States.

Dated: This 8th day of June, 1950.

/s/ WM. C. MATHES,

United States District Judge.

Presented by:

ERNEST A. TOLIN,
United States Attorney.

IRL D. BRETT,
Special Assistant to the Attorney General,
Lands Division Department of Justice

By /s/ IRL D. BRETT,
Attorneys for Defendant.

Approved as to Form Under Rule VII:

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MILAN MEDIGOVICH,
Attorney for Plaintiff.

Judgment entered June 9, 1950.

[Endorsed]: Filed June 9, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Erwin P. Werner, plaintiff above, named hereby, appeals to the Circuit Court of Appeals for the Ninth Circuit from that Order of Dismissal and from the judgment entered in this action on June 9, 1950, Book 66, page 411.

Dated: This 12th day of June, 1950.

/s/ ERWIN P. WERNER,
Proper personam.

[Endorsed]: Filed June 12, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Erwin P. Werner, plaintiff above-named and the appellant herein, hereby designates the entire record before the District Court, including all papers, and pleadings filed with the District Court.

Pursuant to the provisions of Rule 75(o) of the rules of civil procedure for the United States District Courts, and pursuant to United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled court transmit all the original papers in the file dealing with the action or the proceeding in which the appeal has been taken, including the Notice of Appeal heretofore filed and this designation, together with the Complaint, Motion to Dismiss the Order of Dismissal, and the Judgment entered thereon.

Dated: June 12, 1950.

/s/ ERWIN P. WERNER,
In proper personam.

[Endorsed]: Filed June 12, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 32, inclusive, contain the original Complaint; Motion to Dismiss; Memorandum of Decision; Order of Dismissal, Notice of Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12th day of July, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12612. United States Court of Appeals for the Ninth Circuit. Erwin P. Werner, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 14, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Circuit Court of Appeals
For The Ninth District
No. 10539—WM. Civ.

ERWIN P. WERNER,

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

DESIGNATION OF POINTS

The points upon which Appellant intends to rely are:

1. Court erred in dismissing plaintiff's complaint on the ground the statute of Limitations caused both actions to lapse.

2. Court erred in not holding that “determination of the unlimited emergency, as declared by the President of the United States on May 27, 1941, (Proclamation 2487,)” ended with the cessation of hostilities by the “Axis Belligerents” August 14, 1945.”

/s/ ERWIN P. WERNER,
In proper personam.

Affidavit of service by mail attached.

[Endorsed]: Filed July 20, 1950.

[Title of Court of Appeals and Cause.]

REQUEST TO PRINT RECORD

To the Clerk:

You are hereby requested to have the entire record on Appeal printed in the above-entitled case.

/s/ ERWIN P. WERNER,
In proper personam.

Affidavit of service by mail attached.

[Endorsed]: Filed July 20, 1950.